Commerce International Merchant Bankers Bhd v Metroplex Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1–24–2394 OF 2005
LEE SWEE SENG JC
18 JUNE 2010

Auctions and Auctioneers — Sale of land — Sale by public auction — Auctioneers — Duties and responsibilities of — Whether auctioneer to prepare proclamation of sale — Whether chargee to prepare conditions of sale — National Land Code s 258(2)(a) — Registrar's Circular No 1 of 2005

Land Law — Auctions and auctioneers — Auctioneers — Duties and responsibilities of — Whether auctioneer to prepare proclamation of sale — Whether chargee to prepare conditions of sale — National Land Code s 258(2)(a) — Registrar's Circular No 1 of 2005

Land Law — Sale of land — Auction — Procedure for sale of land by way of public auction — Proclamation of sale — Contents, nature and effect of

Land Law — Sale of land — Auction — Procedure for sale of land by way of public auction — Whether whole conditions of sale to be advertised — Whether sufficient for only proclamation of sale to be advertised — Whether proclamation of sale to be prepared by court-appointed auctioneer — Whether proclamation of sale ought to contain contact details of chargor's solicitors — Policy reasons against including contact details of chargor's solicitors in proclamation of sale — Whether Registrar's Circular No 1 of 2005 ultra vires the National Land Code and the Auction Sales Enactment (FMS Cap 81)

The chargee ('the plaintiff') had obtained an order for sale of the chargor's ('the defendant's') property on 17 July 2007. The chargor's appeal against the order was dismissed by the Court of Appeal. The chargor filed various other applications that had twice stalled the chargee's intended sale of the charged property by way of public auction. Separately, the chargor had also through KL High Court Suit 22–329 of 2009 ('suit 329/09') applied to set aside the charge. The chargee subsequently obtained a third auction date and consequential orders from the deputy registrar ('the DR'), notwithstanding a vigorous application (encl 76) by the chargor for directions and orders, ostensibly in an attempt to prevent the third auction. The DR dismissed substantially the

chargor's application and a preliminary objection and the chargor appealed to the judge. On appeal, the chargor complained, inter alia, that: (a) the chargee's advertisement of the proclamation of sale ought to have included the entire conditions of sale; (b) the chargee had breached s 258(2)(a) of the National Land Code ('NLC') by not preparing the proclamation of sale; (c) the proclamation of sale ought to have been sent to the chargor's solicitors for verification before being approved by the DR; (d) the name and contact details of the chargee's solicitors ought not to appear in the proclamation of sale but only the name and contact details of the court appointed auctioneer, alternatively the details of the chargee's solicitors ought only to appear with the details of the chargor's solicitors; (e) the Registrar's Circular 1 of 2005 ('the registrar's circular') was ultra vires the National Land Code and the Auction Sales Enactment (FMS Cap 81); and (f) the chargor ought to be given leave to advertise simultaneously with the proclamation of sale, that it had filed suit 329/09 to set aside the charge.

Held, dismissing the chargee's appeal with costs:

(1) The registrar's circular serves to promote uniformity in the procedure of sale as well as in the conditions of sale. The circular does not state that the whole of the conditions of sale should be advertised. The proclamation of sale is intended to give notice to potential bidders and the chargor of the essential details of the property so that those interested may contact the chargee, its solicitors or the auctioneer. The proclamation of sale contains details of the land including encumbrances and various endorsements against the title as well as a description of the property, the parties to the action and the dates of the various orders of court, the time, date and place of auction and the reserved price — all of which would be more than sufficient notice to the world of the public auction, especially in the instant case where advertisements of the proclamation of sale were placed in the foreign press (see paras 13–14).

(2) The chargee need not prepare the proclamation of sale. It is the court appointed auctioneer who prepares the proclamation of sale. The chargee prepares the conditions of sale as required by s 258(2)(a) of the NLC (see para 20). *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614; [1997] 2 CLJ 131 followed.

(3) Draft copies of the proclamation and conditions of sale were made available to the DR and counsel for the chargor on 21 April 2010 when the parties appeared before the DR under s 258(2)(a) of the NLC for any determination of the conditions of sale made in accordance with the order for sale and the registrar's circular. In any event, the chargor's third complaint was academic as it was wrongly premised on the

chargee preparing the proclamation of sale when in fact it is the court appointed auctioneer who prepares the proclamation of sale (see para 20).

(4) The chargee's interest in the public auction was that of realising its security in the charged property. The chargor's argument that the chargee was in a conflict of interest situation so as to be disqualified from putting its solicitors name and contact details at the bottom of the proclamation of sale was unfathomable. The registrar's circular itself at condition 4 of the conditions of sale, allows the chargee to make a bid for the property (see para 21).

(5) The registrar's circular provides for the names and contact details of the chargee's solicitors and the court appointed auctioneer for interested bidders to contact. There is no harm in stating the name and contact details of the chargee's solicitor in the proclamation of sale. Once an order for sale and a public auction is fixed, a chargee's rights over the charged property are circumscribed and constrained by the law. However, the registrar's circular neither permits nor prohibits the chargor's solicitor's name from being in the proclamation of sale for contact purposes. The court thus has a discretion in the matter. There is a good policy reason not to include the name or contact details of the chargor's solicitor in the proclamation of sale — a chargor who wants to scuttle the public auction would give all kinds of reasons to discourage potential purchasers. In the instant case, the harm that could be perpetrated by the chargor far outweighed the good that it was capable of promoting, whereas any harm that could be traceable to the chargee was very minimal if at all, for it was not in the chargee's interest to delay the public auction. In any event, the chargor was estopped by its covert and overt actions and omissions from complaining of the non-inclusion of its solicitors' name and contact details in the proclamation of sale. This was not something that would prejudice the chargor (see paras 22, 24 & 26).

(6) The chargor was not able to show how the registrar's circular was ultra vires the NLC and the Auction Sales Enactment. Should there be anything in the registrar's circular in conflict with any relevant statutory provisions, then those statutory provisions would prevail. If any requirements in the registrar's circular contravened the NLC, then the NLC would prevail. The chargor was not able to show any such conflict or contravention (see paras 27–28); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 referred; *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409 referred; *Muniandy a/l Thamba Kaundan & Anor v D & C Bank*

Bhd & Anor [1996] 1 MLJ 374; [1996] 2 CLJ 586 referred; *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440; [1998] 2 CLJ 266 referred.

(7) There were no merits in the chargor's argument for leave to advertise Suit 329/09 since it was meant to discourage, delay and derail the auction fixed for the third time, and for which the chargee had incurred colossal costs in placing the relevant advertisements in both the local and foreign press as ordered by the court. The chargor's success in suit 329/09 was doubtful since the court in granting the order for sale must have been satisfied that there was no cause to the contrary shown for the order for sale (see para 40).

[Bahasa Malaysia summary

Pemegang gadaian ('plaintif') telah memperoleh perintah untuk penjualan hartanah penggadai (defendan) pada 17 Julai 2007. Rayuan penggadai terhadap perintah tersebut telah ditolak oleh Mahkamah Rayuan. Penggadai memfailkan beberapa permohonan lain yang telah sebanyak dua kali menghalang penjualan yang diniatkan oleh pemegang gadaian terhadap hartanah yang digadai melalui lelongan awam. Penggadai juga, secara berasingan, melalui 'KL High Court Suit 22-329 of 2009' ('guaman 329/09') memohon untuk mengetepikan gadaian tersebut. Pemegang gadaian kemudian memperoleh tarikh lelongan ketiga dan perintah-perintah berkaitan daripada timbalan pendaftar ('TP'), walaupun terdapat permohonan (lampiran 76) oleh penggadai untuk arahan dan perintah-perintah, kononnya dalam cubaan untuk menghalang lelongan ketiga. TP menolak secara substansial permohonan penggadai dan bantahan awalan dan penggadai merayu kepada hakim. Atas rayuan, penggadai mengadu, antara lain, bahawa: (a) pengiklanan perisytiharan jualan pemegang gadaian seharusnya termasuk keseluruhan syarat-syarat jualan: (b) pemegang gadaian melanggar s 258(2)(a) Kanun Tanah Negara ('KTN') dengan tidak menyediakan perisytiharan jualan; (c) perisytiharan jualan seharusnya dihantar kepada peguamcara penggadai untuk pengesahan sebelum diluluskan oleh TP; (d) butiran nama dan cara menghubungi peguamcara pemegang gadaian tidak sepatutnya ada di dalam perisytiharan jualan tetapi hanya butiran nama dan cara menghubungi pelelong yang dilantik oleh mahkamah, secara alternatif butiran peguamcara pemegang gadaian hanya boleh ada bersama dengan butiran peguamcara penggadai; (e) Pekeliling Pendaftar No 1 Tahun 2005 ('pekeliling pendaftar') adalah ultra vires Kanun Tanah Negara dan Enakmen Jualan Lelong (FMS Cap 8); dan (f) penggadai perlu diberikan kebenaran untuk mengiklankan bersama-sama dengan perisytiharan jualan, bahawa ia telah memfailkan guaman 329/09 untuk mengetepikan gadaian.

Diputuskan, menolak rayuan pemegang gadaian dengan kos:

(1) Pekeliling pendaftar tersebut bertujuan untuk mempromosi keselarian

dalam prosedur jualan serta syarat-syarat jualan. Pekeliling tersebut tidak menyatakan bahawa keseluruhan syarat jualan harus diiklankan. Perisytiharan jualan untuk memberikan notis kepada penawar berpotensi dan penggadai terhadap butiran penting hartanah tersebut supaya sesiapa yang berminat boleh menghubungi pemegang gadaian, peguamcaranya atau pelelong. Perisytiharan jualan mengandungi butiran tanah termasuk beban dan berbagai indorsmen terhadap hak milik dan juga deskripsi hartanah tersebut, pihak-pihak kepada tindakan dan tarikh berbagai perintah mahkamah, masa, tarikh dan tempat lelongan dan harga risab — kesemuanya yang menjadi notis yang lebih dari cukup kepada semua tentang lelongan awam tersebut, khususnya di dalam kes ini di mana pengiklanan perisytiharan jualan dimasukkan di dalam akhbar asing (lihat perenggan 13–14).

(2) Pemegang gadaian tidak perlu menyediakan perisytiharan jualan. Pelelong yang dilantik mahkamah yang menyediakan perisytiharan jualan. Pemegang gadaian menyediakan syarat-syarat jualan seperti yang diperlukan oleh s 258(2)(a) KTN (lihat perenggan 20). *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614; [1997] 2 CLJ 131 diikut.

(3) Salinan draf perisytiharan dan syarat-syarat jualan diberikan kepada TP dan peguam penggadai pada 21 April 2010 apabila pihak-pihak hadir di hadapan TP di bawah s 258(2)(a) KTN untuk apa-apa pertimbangan syarat-syarat jualan yang dibuat berikutan perintah jualan dan pekeliling pendaftar. Walau bagaimanapun, aduan ketiga penggadai adalah akademik kerana ia berdasarkan secara salah atas pemegang gadaian menyediakan perisytiharan jualan apabila sebenarnya ia adalah pelelong yang dilantik oleh mahkamah yang menyediakan perisytiharan jualan (lihat perenggan 20).

(4) Kepentingan pemegang gadaian di dalam lelongan awam adalah untuk merealisasikan sekuritinya di dalam hartanah yang digadai. Hujahan penggadai bahawa pemegang gadaian berada dalam situasi konflik kepentingan sehingga tidak dibenarkan meletakkan butiran nama dan cara menghubungi di bahagian bawah perisytiharan jualan adalah tidak diduga. Pekeliling pendaftar itu sendiri di dalam syarat No 4 syarat-syarat jualan, membenarkan pemegang gadaian untuk membuat tawaran terhadap hartanah tersebut (lihat perenggan 21).

(5) Pekeliling pendaftar memperuntukkan bagi butiran nama dan cara menghubungi peguamcara pemegang gadaian dan pelelong yang dilantik oleh mahkamah untuk penawar yang berminat menghubungi mereka. Tidak salah untuk menyatakan nama dan cara menghubungi peguamcara pemegang gadaian di dalam perisytiharan jualan tersebut. Sebaik sahaja perintah jualan dan lelongan awam ditetapkan, hak pemegang gadaian terhadap hartanah yang digadai adalah terhad dan

terbatas di bawah undang-undang. Walau bagaimanapun, pekeliling pendaftar tidak membenarkan atau menghalang nama peguamcara penggadai daripada diletakkan di dalam perisytiharan jualan untuk tujuan dihubungi. Mahkamah oleh itu mempunyai budi bicara di dalam hal tersebut. Wujud alasan polisi yang baik untuk tidak menyertakan butiran nama atau cara menghubungi peguamcara penggadai di dalam perisytiharan jualan — Penggadai yang ingin menggagalkan lelongan awam akan memberikan berbagai alasan untuk tidak menggalakkan pembeli berpotensi. Di dalam kes ini, masalah yang boleh ditimbulkan oleh penggadai jauh mengatasi kebaikan yang boleh dilakukannya, manakala apa-apa keburukan yang boleh dilakukan oleh pemegang gadaian adalah amat minimum, jika ada, kerana ia bukan dalam kepentingan pemegang gadaian untuk melengahkan lelongan awam tersebut. Walau apa pun, penggadai diestop oleh tindakan-tindakan dan peninggalan terselindung dan jelas daripada pengaduan tentang peninggalan nama dan cara menghubungi peguamcaranya di dalam perisytiharan jualan. Ini bukan sesuatu yang menjejaskan penggadai (lihat perenggan 22, 24 & 26).

(6) Penggadai tidak dapat menunjukkan bagaimana pekeliling pendaftar adalah ultra vires KTN dan Enakmen Jualan Lelong. Jika ada sesuatu di dalam pekeliling pendaftar yang berkonflik dengan apa-apa peruntukan statutori, maka peruntukan statutori lebih mengatasi. Jika apa-apa keperluan di dalam pekeliling pendaftar bertentangan dengan KTN, maka KTN akan mengatasi. Penggadai tidak berupaya menunjukkan wujudnya konflik atau percanggahan sedemikian (lihat perenggan 27–28); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 dirujuk; *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409 dirujuk; *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 [1996] 2 CLJ 586 dirujuk; *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440; [1998] 2 CLJ 266 dirujuk.

(7) Tidak ada merit di dalam hujahan penggadai untuk kebenaran mengiklankan guaman 329/09 oleh kerana ia bertujuan untuk menghalang, melengahkan dan melencongkan lelongan yang ditetapkan bagi kali ketiga, dan yang untuknya pemegang gadaian telah membelanjakan kos yang banyak untuk meletakkan iklan yang relevan di dalam kedua-dua akhbar tempatan dan asing seperti yang diperintahkan oleh mahkamah. Kejayaan penggadai di dalam guaman 329/09 adalah diragui kerana mahkamah di dalam memberikan perintah jualan mesti berpuas hati bahawa tidak ada sebab sebaliknya ditunjukkan bagi perintah jualan tersebut (lihat perenggan 40).]

Notes

For cases on auction, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4065–4087.

For cases on auction and auctioneers in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2265–2266.

For cases on sale of land in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1686–1697.

Cases referred to

Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1998] 2 MLJ 440; [1998] 2 CLJ 266, CA (refd)

Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors [1996] 2 MLJ 614; [1997] 2 CLJ 131, CA (folld)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374; [1996] 2 CLJ 586, FC (refd)

Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi [1997] 2 MLJ 118; [1997] 2 CLJ 409, CA (refd)

Legislation referred to

Auction Sales Enactment FMS Cap 81 s 4

Companies Act 1965 s 176(10)

National Land Code ss 256(3), 257(1), 258(1)(b), (2)(a), 259(2), (3A)(a), 266A(1)

Rules of the High Court 1980 Forms 16F, 16Q

Wong Rhen Yen (K Balaguru with him) (Dennis Nik & Wong) for the appellant/defendant.

Alan Gomez (Tommy Thomas with him) (Tommy Thomas) for the respondent/plaintiff.

Lee Swee Seng JC:

PROLOGUE

[1] Many of us would have passed through if not passed by the place called the Putra Place. It is where 'The Legend' hotel is and where the Companies Commission of Malaysia used to be. There is a shopping mall too in the building called 'The Mall'. It is the iconic building of the Metroplex Group; its deep brown structure stands stoically silhouetting the skyline of Kuala Lumpur.

[2] Many however are oblivious to the many battles that have been fought by the defendant chargor to prevent the property and the land on which the property stands (collectively called 'the land') from being auctioned off by a

consortium of bankers led by the plaintiff chargee. What started as a seemingly straight-forward step-by-step procedure as set out under the National Land Code for the plaintiff to realise its security has now stretched over a span of nearly five years as the defendant chargor sought to skirt, scuttle and stall the sale by public auction in an elaborate scheme designed to delay and derail the disposal of the land by way of a public auction pursuant to an order for sale.

PROBLEM

[3] An order for sale was made on 16 July 2007 by Wahab Patail J (as he then was) following an originating summons dated 25 October 2005 and the appeal to the Court of Appeal was dismissed. In between there were various applications which have the effect of stay of the order for sale which were disallowed by the court. The first auction was fixed on 30 April 2008 at a reserve price of RM705,000,000 but the auction was not successful.

[4] The defendant chargor was undaunted and undettered and with dogged determination it applied to the Shah Alam High Court under s 176(10) of the Companies Act 1965 for a restraining order restraining all legal action against the Metroplex Group of Companies including the defendant. The said order was obtained ex parte on 22 January 2009 in MT3–24–67 of 2009 ('Shah Alam proceedings') in clear violation of the order of the High Court in Kuala Lumpur granted on 30 November 2004 by Vincent Ng J (as he then was) in dismissing the first restraining order applied for by the Metroplex Group of Companies with the condition that any fresh restraining order under s 176(10) of the Companies Act 1965 shall be conditional upon service of such an application on the respondents and interveners in the suit and that include the plaintiff in this action. The ex parte restraining order was set aside by Rosnaini Saub J on 3 April 2009 for, inter alia, the lack of a full and frank disclosure of a material fact in the order of Vincent Ng J (as he then was) and the lack of bona fide on the part of the Metroplex Group of Companies.

[5] Though the restraining order was set aside, it did what the defendant had purposed it to do; that is to derail the public auction fixed then for a second time on 16 April 2009 at a reserve price of RM634,500,000. There was insufficient time to place the advertisements on time for the High Court had through Wahab Patail J (as he then was) on 6 January 2009 ordered, inter alia, the following:

(3) that the defendant do advertise at its own costs the revised proclamation of sale in a daily newspaper in Hong Kong (with coverage to China), Taiwan, Singapore and Japan on two separate occasions, once on a Monday, and the second time on a Wednesday of the following month;

(4) that the plaintiff do advertise at its own costs the revised proclamation of

sale once in the *New Straits Times* in Malaysia; and in a daily newspaper in Indonesia and Los Angeles on two separate occasions, once on a Monday, and the second time on a Wednesday of the following month;

(5) the sale of the said land be subject to the remaining orders of the deputy registrar dated 18 September 2008.

[6] The plaintiff made an application to the court for the second auction date to be set aside and the next auction date was fixed subsequently on 20 August 2009. The auction was also not successful.

PRAYERS

[7] On 19 January 2010 the plaintiff applied for another auction date to be fixed and it was fixed originally on 27 May 2010 by the deputy registrar together with the other usual orders with respect to the reserve price being fixed at RM571,050,000 (being a reduction of 10% from the previous reserve price of RM634,500,000), the court deposit of RM2,000 to be paid to the registrar of the High Court and the appointment of an auctioneer; all these by consent of the parties.

[8] In the meanwhile however, the defendant had on 24 February 2010 applied to the court in encl 76 pursuant to the liberty to apply clause in the order for sale dated 16 July 2007 and/or under the inherent jurisdiction of the court for the following orders:

(a) that the directions given pursuant to the order dated 6 January 2009 by Wahab Patail J (sic) be maintained in any order made pursuant to the plaintiff's summons in chambers dated 19 January 2010 (encl 73);

(b) that there be compliance with s 258(2)(a) of the National Land Code that the proclamation of sale shall be prepared by the plaintiff (chargee);

(c) that the draft copy of the proclamation of sale as prepared by the plaintiff be forwarded to the defendant's solicitors for verification so that the proclamation of sale (to be advertised) is in accordance with the order and any determination by the registrar of this honourable court, before such proclamation of sale be approved by the registrar of this honourable court for eventual advertising;

(d) that the proclamation of sale does not contain any reference to the plaintiff's solicitors and all enquiries are to be made to the licensed auctioneer only;

(e) in the alternative, the defendant's solicitors name and contact number are to be included in the proclamation of sale together with that of the plaintiff's solicitors;

(f) that the defendant be given leave to advertise simultaneously with the proclamation of sale at the defendant's cost:

(i) that the defendant has filed proceedings vide Kuala Lumpur High Court Suit No 22–329 of 2009, inter alia, to set aside the charge and where the plaintiff in this action is the defendant in the aforementioned action;

(ii) there is an appeal pending in the Court of Appeal of Malaysia against the decision of this honourable court to grant an order for sale in respect of the proceedings;

(g) the defendant's advertisement as in prayer 6(i) and (ii) be of equal prominence as that of the proclamation of sale.

[9] These can be likened to an offensive from different fronts to put every obstacle to the sale. Perhaps the desperate action of a desperate person that must destine the said land not to be sold. It is to be noted that this application was not made when the previous summons for directions for the previous two auction dates were being heard.

[10] At the hearing of encl 76 on 21 April 2010, the defendant chargor also raised a preliminary objection that the plaintiff chargee had failed to prepare the conditions of sale pursuant to s 258(2)(a) of the National Land Code ('NLC'). Having heard submissions by counsel, the deputy registrar dismissed the preliminary objection and also prayers 2–5 of encl 76.

[11] At the continued hearing of encl 76 on 22 April 2010, the deputy registrar:

(a) allowed prayer (1) of encl 76 and consequently vacated the auction date of 27 May 2010 and fixed it on 28 June 2010 to enable the parties to comply with the advertising orders of Wahab Patail J (as he then was) made on 6 January 2009; and

(b) proceeded to settle the proclamation of sale and conditions of sale in the presence of counsel for the plaintiff chargee and the defendant chargor, and directed that the proclamation of sale and conditions of sale comply with Annexure A of the Registrar's Circular No 1 of 2005.

[12] The defendant chargor appealed against the aforesaid orders of the deputy registrar and the notices of appeal in encls 10 and 11 in respect of the orders made on 21 April 2010 and 22 April 2010 by the deputy registrar came

before me for argument and decision.

PRINCIPLES

[13] The first complaint leveled by the defendant against the plaintiff by way of this appeal is that the advertisement of the proclaimation of sale in the local as well as foreign press should include the conditions of sale. As only the proclamation of sale was advertised that was not sufficient compliance with the order of court given by Wahab Patail J (as he then was). To begin with there is a Registrar's Circular No 1 of 2005 on public auctions of properties ordered by the court pursuant to an order for sale. The purpose of the registrar's circular is to promote uniformity in the procedure of sale as well as in the conditions of sale. No where is it stated in the registrar's circular that the whole of the conditions of sale should be advertised. I suppose it is for good reason too. One can imagine how long an advertisement of a proclamation of sale would run into if the conditions of sale have to be advertised with it. The purpose of advertising the proclamation of sale is to give notice to potential bidders and the chargor of the essential details of the property up for auction and the reserve price so as to arouse sufficient interest in those keen to make a bid to inquire further by taking the initiative to contact the chargee or its solicitors or the auctioneer. Their contact details are stated clearly at the bottom of the proclamation of sale. To have to advertise the conditions of sale would be both cumbersome and costly bearing in mind that most of the properties for auction pursuant to an order for sale would be less than RM1m. In any event these are some-what standard conditions of sale and one can imagine the newspapers' 'notices' columns running into many pages being inundated with the same conditions of sale for similar properties being repeated *ad nauseam*. Surely the limited columns in the newspapers can be put to better use not to mention the saving of costs and our forest as well. Is the defendant chargor prejudiced in any way by the non-advertisement of the conditions of sale? I don't think so. As I said before any interested bidder need only to take the initiative to inquire further by contacting the chargee's solicitors or the auctioneer and they would be supplied the necessary information.

[14] The proclamation of sale contains details of the land including encumbrances and various endorsements against the title as well as a description of the various parts and floors to the property, the parties to the action and the dates of the various orders of court with respect to the various summons for direction, the time, date and place of auction and the reserved price — all of which would be more than sufficient notice to the world of the public auction, what more with advertisements in foreign press which the chargee had taken out in the USA in the Wall Street Journal, Los Angeles, USA and the Los Angeles Times, Los Angeles, USA as well as the Jakarta Posts, Indonesia. The plaintiff in compliance with the court order on advertising the

proclamation of sale had incurred some RM70,000 on advertisement costs alone. This is in sharp contrast to the inaction of the chargor in failing to this day to take out advertisements in the national press in Hong Kong (with coverage to China), Taiwan, Singapore and Japan on two separate occasions. Perhaps it is the prohibitive costs of the advertisement, what more if it is to be advertised with the conditions of sale.

[15] When asked by the court as to whether the defendant chargor is in contempt of court for not complying with the court order on advertisement, the defendant's counsel merely surmised that the defendant might be but brushed the point aside as being not relevant. I state that the defendant has not come with clean hands and its every action has been nothing but to scuttle the auction sale of the land.

[16] An advertisement of a notice of a public auction is no different from an advertisement of for instance a substituted service of a summons. One does not have to set out the whole statement of claim but merely a notice of the nature of the claim and the amount claimed and for good reason.

[17] A second complaint advanced by the defendant chargor is that there must be compliance with s 258(2)(a) of the National Land Code in that the proclamation of sale shall be prepared by the plaintiff (chargee). This is not what is spelled out in s 4 of the Auction Sales Enactment FMS Cap 81 which applicable to the Federal Territory of Kuala Lumpur vide PU(A) 63/1974. The proclamation of sale is prepared by the auctioneer appointed by the court. The conditions of sale on the other hand is prepared by the chargee as stated in s 258(2)(a):

> (2) The Chargee on whose application the order was made shall —
>
> (a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the Court.

[18] The interplay of s 4 of the Auction Sales Enactment and s 258(1)(b) and (2)(a) of the National Land Code has been eloquently elucidated by Siti Norma Yaakob JCA (as she then was) in *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614 at p 625; [1997] 2 CLJ 131 at p 143 as follows:

> We will start by considering whether the provisions of s 258(1)(b) and (2)(a) of the NLC have been breached by the predecessor bank. These two subsections set out the procedure to be followed after an order of sale has been obtained and prior to the execution of the sale itself. Section 258(1)(b) is directed to the registrar of the High Court and it empowers such registrar to see that the sale is advertised publicly in accordance with any rules of court or in the absence of such rules the customary practice in the state. There are no specific rules regulating the procedure for

advertising a judicial sale by public auction. The Rules of the High Court 1980, where one expects such procedure to be set out, is silent on this although there is a chapter on charge actions in O 83 and another chapter, O 31, that makes provisions as to the directions to be given when carrying out such sale.

However there are provisions in s 4 of the Auction Sales Enactment FMS Cap 81 regulating what particulars a public notice or proclamation of sale should contain and the onus is on the auctioneer, conducting the sale, to prepare and advertise such sale. What happens in practice is that the auctioneer named by the court to conduct the sale, working together with the chargee, draws up the proclamation of sale containing all particulars as required by s 4 and submits the proclamation of sale for approval to the SAR. Once approved, the auctioneer will take all the necessary steps to have the proclamation of sale advertised. In this way the SAR would have seen that the sale has been publicly advertised as is required of him under s 258(1)(b) and (2)(a) of the NLC.

[19] What is stated as being silent in the Rules of the High Court is now being supplemented by the Registrar's Circular No 1 of 2005 which repealed Practice Note No 2/1987, Practice Direction No 8/1987, Practice Direction 5/1989, Practice Note 5/1989, Chief Registrar's Circular 1/1997 and Practice Direction 3/1998.

[20] The third complaint is that the draft copy of the proclamation of sale as prepared by the plaintiff chargee be forwarded to the defendant chargor solicitors for verification so that the proclamation of sale (to be advertised) is in accordance with the order and any determination by the registrar of this honourable court, before such proclamation of sale be approved by the registrar of this honourable court for eventual advertising. I find this complaint to be misplaced as it is wrongly premised on the chargee preparing the proclamation of sale when in fact it is the court appointed auctioneer who prepares the proclamation of sale. At any rate, the third complaint has become academic as the draft copies of the proclamation and conditions of sale were made available to the deputy registrar and counsel for the chargor on 21 April 2010 when parties appeared before the registrar under s 258(2)(a) for any determination of the conditions of sale made in accordance with the order for sale and the registrar's circular.

[21] A fourth and a fifth complaint framed against the chargee in this appeal are that the name and contact details of the chargee's solicitors should not appear at all in the proclamation of sale but just that of the auctioneer who has been duly appointed by the court to conduct the auction. Alternatively if at all the chargee's solicitors name should be there then the chargor's solicitors name and contact details should be included as well. The reason advanced is that the chargee is an interested party to the auction and could itself be a bidder for the property to be auctioned and hence an interested party. I find no merit in this argument. The chargee's interest is no different from a solicitor's conduct of a

case in court; merely because he has interest in the fees to be collected at the conclusion of the case does not conflict him out from advancing his best arguments in court in his advocacy before the court. The chargee's peculiar and particular interest in the public auction is precisely and purely that of realising its security in the charged property upon the chargor's default. How the plaintiff chargor could find itself in a conflict of interest situation so as to be disqualified from putting its solicitors name and contact details at the bottom of the proclamation of sale is quite unfathomable. The registrar's circular itself at Condition 4 of the Conditions of Sale, allows the chargee to make a bid for the property as well.

[22] Indeed the registrar's circular states only two names and contact details for further inquiries for those initiated in doing so; that of the chargee's solicitors and the court-appointed auctioneer. The reasons are not difficult to find. The chargee has an interest in the charged property being disposed of soonest possible so as to recover the large loan long outstanding. They are in possession of details of the property and the conditions of sale and the antecedents with respect to the property in case potential bidders want to probe further. What harm can the chargee do if its solicitors name and contact details are in the proclamation of sale? Can they secretly and surreptitiously scuttle the auction by a private treaty sale on terms less fabourable in terms of purchase price? I don't think so because the chargee's rights over the charged property once an order for sale and a public auction is fixed are both circumscribed and constrained by the law. No private treaty is allowed and a public auction sale has to be carried out where bidders publicly bid for the property starting from the reserve price. This is to ensure that the best possible price is obtained for any surplus after paying the secured chargees will go to the chargor.

[23] No one of course will challenge the auctioneer with respect to its name and contact details being there on the proclamation of sale. Indeed his powers and duties are set out on the Public Auction Sales Enactment FMS Cap 81 which is applicable to the Federal Territory vide PU(A) 63/1974.

[24] The registrar's circular on public auction is silent on the name and contact details of the chargor's solicitors being there for purposes of inquiries by potential bidders. It neither permits nor prohibits the chargor's solicitors name from being there for contact purposes in the proclamation of sale.

[25] I take the view that the registrar's circular is not cast in concrete or chiseled in stone. Like all circulars it is issued for ease of administration and for reason of expediency and efficiency. As its name suggests it is a document released for circulation for in this instance to create uniformity in the conditions of sale and in the form and format of the proclamation of sale and the information to be included. It is time-saving and anything that saves time

would save costs as well. It does not have the force or the fear of law. It may perhaps have a feel of the law though. If one tries to put in terms not permitted in the circular one may suffer delay in the approval of the 'conditions of sale' or perhaps either the chargor or chargee would object to its inclusion in an application that would be heard at the first instance by the deputy registrar. For cogent reasons constrained by the contingencies of circumstances that may arise the court on an application by the chargee or chargor may make such amendments to the standard conditions of sale set out bearing in mind always the non-negotiable minimum conditions as stipulated in s 257(1) and 259(2) of the National Land Code.

[26] Should the court generally and specifically in the instant case allow the chargor's solicitors name and contact details to be included in the proclamation of sale? It is a matter where the court has a discretion to decide based on the reasons advanced justifying a departure from prescribed practice. There is a good policy reason not to include the name of the chargor 's solicitors or its contact in the proclamation of sale. A chargor who wants to scuttle the public auction would give all kind of reasons to discourage the potential purchasers including exaggerating the risks involved in the purchase or giving some misinformation that the loan is being settled and the auction will be called off. Worse still the chargor may capitalise on the fact that it has filed an action to declare the charge created as being null and void and unenforceable and so convey a scenario of endemic risk to be avoided at all cost. This, the chargee solicitors, in a spirited submission by its counsel Tommy Thomas, state is a very real and present danger seeing the deleterious and deplorable conduct of the chargor thus far in designing diverse actions and applications in their tireless determination to delay and derail the auction. Moreover if the chargor is so passionate of such an inclusion of their solicitors' contact name and details in the proclamation of sale they should have raised this in the first and second auction when the respective summons for direction were heard and not now at the eleventh hour on 11 June 2010 when colossal cost to the tune of about RM70,000 have been incurred in advertisements in the foreign press with not a single advertisement in Hong Kong, Singapore, Taiwan and Japan by the chargor eventhough ordered by the court. The chargor had not obtained any stay order from the registrar with respect to a stay of the order refusing the inclusion of the name and contact details of the chargor's solicitors in the proclamation of sale. The harm that could be perpetrated by the chargor far outweigh the good that it is capable of promoting whereas any harm that could be traceable to the chargee is very minimal if at all for it is not in the chargee's interest to delay the public auction. In any event the chargor is estopped by their covert and overt actions and ommissions from complaining of the non-inclusion of the chargor solicitors name and contact details in the proclamation of sale. Moreover, this is not something that will prejudice the chargor. If the chargor has any potential bidders it can always pass on the details of the conditions of sale to them.

[27] The defendant chargor's counsel have even contended that the registrar's circular in question is ultra vires the National Land Code and the Auction Sales Enactment. I must confess I cannot follow that argument. There is nothing sinister in providing by way of a registrar's circular some standard 22 Conditions of Sale for a public auction sale. It has not been pointed how how any of the 22 conditions of sale have violated the National Land Code. It fills in the gaps not covered by the National Land Code where the procedure at auction is concerned. Not every public auction is a court-ordered auction. An owner of a house can put his property up for auction by way of a public auction to as to fetch the best possible price, to save time on negotiation because the conditions of sale are already determined by the owner and it also saves legal fees because the auctioneer fees are much lower than perhaps a real estate agent fees coupled with solicitors' fees. For such non-court-ordered public auction, the seller is of course at liberty to advertise or not advertise the proclamation of sale and have his own conditions of sale. For court-ordered auctions I can see no reason for stating that the registrar under the direction of the Chief Judge of Malaya cannot issue the said circular. Should there be anything in the registrar's circular that is in conflict with any relevant statutory provisions then those statutory provisions would prevail. See *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 405; [2002] 1 CLJ 645 at p 665 and *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409.

[28] More particularly should there be any requirements in the registrar's circular that contravene the National Land Code then of course the National Land Code would prevail. But the defendant chargor has not been able to show any. See *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 and *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440; [1998] 2 CLJ 266.

[29] Whilst there may be instances where a chargor is justified in prevailing upon the court in allowing its solicitors name and contact details to be included in the proclamation of sale, this is certainly not one of them for its sins of commission and omission have finally caught up with it — what more when not without some palpable pride it declared through its counsel in open court that for it to advertise the proclamation of sale which it interpreted to include the conditions of sale would be an utter embarrassment because of manifest errors in the conditions of sale. It sounds like a case of a man who could see the speck in his brother's eye but not the log in his own eye.

[30] I find it difficult to follow the chargor's arguments but will nevertheless set them out so that it is manifest for all to follow and form their conclusion. First, it is stated that at p 2 of the proclamation of sale after the words 'Reserve Price', it is stated that 'All intending bidders are required to deposit 10% of the

fixed reserve price by bank draft only in favour of the plaintiff before 9.30am on the day of public auction ...' The registrar's circular had inadvertently stated the time of the deposit of the 10% to be made before 10am. This is a typographical error in the registrar's circular because in Condition 1 of the conditions of sale the time stated for the deposit of the 10% is before 9.30am. In any event this had been corrected by the plaintiff in their proclamation of sale that had been advertised and I cannot see why on this score of a typographical error in the registrar's circular the defendant should not be advertising the proclamation of sale on ground that they would be embarrassed if they were to do so. Excuses for not doing anything will be aplenty if one starts off looking for it.

[31] Second, Condition 6 of the conditions of sale in the English version has removed the deputy registrar's discretion to '... sell and re-auction...' if there is a dispute arising as to the question of the highest bidder. The English version had retained the words: In the event of a dispute arising as to the question of the highest bidder, it is within the discretionary powers of the deputy registrar to decide upon such dispute'. I would say that such a discretion includes the discretion to sell and re-auction. In any event the Bahasa version prevails and I cannot see how a potential bidder can be prejudiced in any way. I am surprised that counsel for the defendant is only raising this matter now when draft copies of the conditions of sale were prepared and made available by counsel for the plaintiff to the deputy registrar and counsel for the defendant on 21 April 2010 together with the draft copies of the proclamation of sale with a view to settling the same before the deputy registrar. Indeed the deputy registrar in fact settled the proclamation of sale and the conditions of sale in the presence of both counsel on 22 April 2010. It is too late in the day for the defendant to capitalise on the error between the English and Bahasa version and to throw tantrum and now refusing to advertise as so ordered by the court. By their own conduct the defendant is now estopped from raising this objection.

[32] Third, the defendant states that Condition 9 of the English version of the conditions of sale has the words in bold which is absent from the Bahasa version: '*Should the buyer fail to pay the said deposit* or refuse to sign the memorandum of sale ...'. Again the Bahasa version would prevail but at any rate there is no prejudice caused to anyone because the situation of the buyer not paying the said deposit does not arise as without so paying he would not be allowed to bid. Or even if the bank draft for the 10% is cancelled the plaintiff can still pursue against the bidder that had defaulted. Again I fail to see any substance in the defendant's argument for not advertising the proclamation of sale on such tenuous trifle tirade.

[33] Fourth, at Condition 13(ii) of the English version of conditions of sale the words 'within 30 days of the receipt of the balance purchase price' are missing from the Condition 13(ii) that states: 'The Plaintiff or Solicitors are to:

(ii) Furnish the Deputy Registrar with an incoming and outgoing statement of accounts after the receipt of the balance purchase price.' In any event this does not prejudice the successful bidder purchaser or the chargor as s 259(3A)(a) of the National Land Code provides that where the chargee is a financial institution, the purchaser at the sale shall, upon payment of the full amount of the purchase price to the chargee and upon receipt of the certification in writing from the chargee not later than 14 days following the payment of such sum, that the balance or the full amount of the purchase price has been paid, shall be entitled to receive from the said officer of the court — (a) a certificate in Form 16F. Section 266A(1) further provides that the chargee shall prepare a statement of all payments due in Form 16Q, up to the date of the sale by public auction, as follows:

(a) any rent payable to the state authority;

(b) any other outgoings payable to the state authority;

(c) any rate payable to the local authority; and

(d) all expenses incurred in connection with the sale by the registrar of the court or land administrator, as the case may be.

[34] As there is no strict time-frame in the National Land Code for the above to be done, it makes good sense for the registrar's circular to have prescribed a period of 30 days from the date of receipt of the balance purchase price for the chargee to furnish the deputy registrar with such a statement.

[35] Again it is a pure administrative matter and nothing turns on it to the prejudice of the defendant chargor.

[36] Fifth, the English version of Condition 16 of the Condition of Sale is different from the registrar's circular in that the phrase 'Subject to the settlement of commission to the court' had not been inserted before the words in Condition 16: 'After the balance of the purchase price is settled within the prescribed time, the Buyer is entitled to receive... from the Deputy Registrar... i) the Certificate of Sale in Form 16F...'. Again this is already provided for in s 268(1)(b) with respect to the application of the purchase price such that its omission in the conditions of sale does not cause prejudice to anyone much less the defendant chargor. The Bahasa version in any event has the said phrase.

[37] What then is the sum total of all these so-called discrepancies in the English version that can so justify the defendant not proceeding with the said advertisement of the proclamation of sale or of asserting that the plaintiff chargee's advertisement has not been in sufficient compliance with the registrar's circular? Vanity of vanities and a chasing after the wind. The defendant chargor is delving deeply into and dissecting the de minimus.

Majoring on minor. Raveling and reveling in the inconsequential and insignificant. Pursuing the paltry and petty. It appears more like activating one's whole arsenal and artillery to make a final assault in avoiding the auction altogether. Alas it is in vain.

[38] That is not the end of the matter. The defendant in its final contention in its sixth complaint argued that the defendant be given leave to advertise simultaneously with the proclamation of sale at the defendant's cost:

(a) that the defendant has filed proceedings vide Kuala Lumpur High Court Suit No 22–329 of 2009, inter alia, to set aside the charge and where the plaintiff in this action is the defendant in the aforementioned action.

[39] It is to be noted that prayer 6(ii) is now academic because the Court of Appeal had already dismissed the appeal against the order for sale.

[40] Again at the risk of being repetitious, I see no merits in this argument which has all the elements of discouraging, delaying and derailing the auction already fixed for the third time on 28 June 2010 and for which the plaintiff chargee has complied at a colossal costs all the advertisements in both local and foreign press as so ordered by the court. Indeed anyone who has the appetite for such a big purchase, perhaps the biggest in recent years at the tune of at least RM571,050,000 would have the resources to do all the due diligence to have knowledge even of the fact that there is such a pending suit. In reality the fresh suit in Kuala Lumpur High Court 22–329 of 2009 is, inter alia, to declare the charge as being null and void and unenforceable. One wonders what possibility of success there is when in granting an order for sale under s 256(3) of the National Land Code the court must have been satisfied that there is no cause to the contrary shown for the order for sale. More than that during submissions, the defendant's counsel have even gone so far as saying that all the various applications filed by the defendant so far should also be disclosed in the advertisement of the proclamation of sale. To suggest that would be to show the boundless energy the defendant chargor has in resisting at every round the the plaintiff chargee efforts in realising their security after default by the defendant chargor. No useful purpose can be served.

PRONOUNCEMENT

[41] Based on all that have been considered above I had on 11 June 2010 dismissed the appeal of the defendant chargor in encls 10 and 11 with cost of RM5,000 to be paid by the defendant to the plaintiff.

POSTCRIPT

[42] The path is now clear for the third auction to proceed on 28 June 2010.

In the event of a successful sale, the final curtain would have fallen for a closing chapter of what was once the mega Metroplex Group of Companies. While mortal men may create corporations with seeming immortality in having perpetual succession, many may not outlive and outlast its founders.

Chargee's appeal dismissed with costs.

Reported by Andrew Christopher Simon